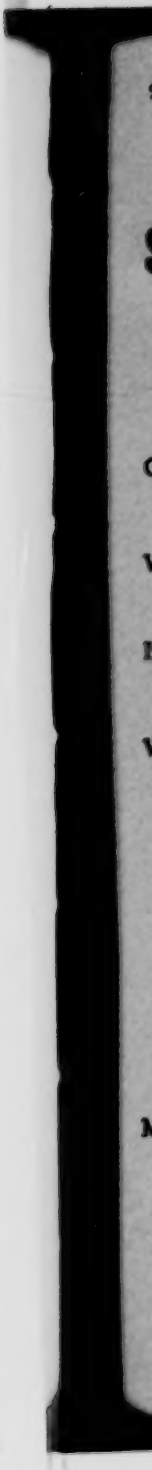

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MICHAEL RODAK, JR

IN THE

UPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-549
No. 72-550

TY OF RICHMOND SCHOOL BOARD,
Petitioner

v.

RGINIA STATE BOARD OF EDUCATION,
Respondent

ADLEY,
Petitioner

v.

RGINIA STATE BOARD OF EDUCATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for the Amicus Curiae National Suburban League, Ltd., In Support of Respondents

arch 13, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-549
No. 72-550

CITY OF RICHMOND SCHOOL BOARD,
Petitioner

v.

VIRGINIA STATE BOARD OF EDUCATION,
Respondent

BRADLEY,
Petitioner

v.

VIRGINIA STATE BOARD OF EDUCATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for the Amicus Curiae National Suburban League, Ltd., In Support of Respondents

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 462 F. 2d 1058. The opinion of the District Court for the Eastern District of Virginia, Richmond Division, is reported at 338 F. Supp. 67.

QUESTION PRESENTED

Whether a federal district court judge has exceeded his discretion in ordering consolidation of three independent and fully integrated school districts for the purpose of achieving further racial balance among the districts upon a finding that state action, to some extent, failed to encourage residential integration among the communities involved.

STATEMENT OF THE CASE

Until 1970, desegregation in the City of Richmond had consisted principally of a "freedom of choice" plan. On March 10, 1970, the plaintiffs initiated an action for further relief to secure city compliance with the most recent Supreme Court pronouncements on local obligations to desegregate. Several new plans were submitted to the district court before final approval was given to a plan implemented for the school year 1971-72 in Bradley v. School Board of the City of Richmond, 325 F. Supp. 828 (1971). However, in November, 1970, the plaintiffs, along with the City of Richmond, compelled joinder with Chesterfield and Henrico Counties, amending its complaint to request relief embodying the consolidation of the three school districts into one. On January 10, 1972, the district court gave judgment for plaintiffs and the

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City of Richmond and directed that a large-scale plan of student transportation and racial balancing be carried out.

On June 5, 1972, the Court of Appeals for the Fourth Circuit reversed the judgment of the district court.

This Court granted certiorari on January 8, 1973, ___ U.S. ___, 41 L.W. 38, 35 L. Ed. 2d 255.

SUMMARY OF ARGUMENT

I. Desegregation cases decided since Brown have framed remedies to counteract state policies the direct object of which has been the continuance of a dual school system. The plaintiffs in this case have pointed to racial imbalances over a broad geographical area that are naturally reflected in the racial composition of the schools; however, plaintiffs are unable to show the critical existence of past or present state discrimination that may be rationally held responsible for such demographic variances.

II. The institutions of separate "white schools" and "Negro schools" held unlawful in Brown have been, or are being, eliminated "root and branch" in the communities involved. While it is true that the races could be spread more evenly over the geographical area, no constitutional doctrine so requires. Moreover, the consolidation orders of the district court cannot help but do violence to the neighborhood school, which traditionally draws much of its vitality from interaction with the surrounding community.

III. The national government is a government of delegated powers. Powers not delegated by the constitution to the national government are reserved to the states and the people. This constitutional formula has defined the federalism which characterizes the United States. Because of the reservation of powers to the states and the people, the states in turn have allowed local communities and units of government substantial autonomy and home-rule. This pattern of government has caused local democracy to be pervasive. A desegregation order should not do violence to local autonomy and home-rule authorized by state government.

ARGUMENT

1. A desegregation order of sweeping impact should be founded on a clear showing of systematic and purposeful discrimination by state officers in the operation of the school system. A constitutional violation cannot be demonstrated by inconclusive or equivocal evidence of discriminatory state action, nor can the stigma of "history of discrimination" be invoked to change radically the import of evidence or the judicial approach.

The "governing law" in this case is supplied by the landmark desegregation cases. Brown v. Board of Education (Brown I), 347 U.S. 483 (1954); Brown v. Board of Education (Brown II), 349 U.S. 294 (1955); Green v. School Board of New Kent County, 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The principles of these cases, if not their practical applications, may be stated with relative simplicity. Brown I held that schools which are racially segregated by law are "inherently unequal," depriving segregated pupils of "the equal protection of the laws

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guaranteed by the Fourteenth Amendment." 347 U.S. at 495. The Court stated that equalization of tangible factors was not enough because the very existence of separation solely because of race "generates a feeling of inferiority as to their status . . . unlikely ever to be undone." Id. at 394.

Brown II urged that desegregation must be undertaken "with all deliberate speed," 349 U.S. at 301, in keeping with the constitutional principles of Brown I.

In Green, a token freedom of choice plan had left the dualistic status quo substantially unaltered. Eighty-five percent of the district's Negro children still attended the old Negro schools, while no white child had transferred to a Negro school. The Court ordered that steps to achieve significant racial mixing be undertaken. Green did not, in effect, mandate transportation of students at the expense of the neighborhood school concept, because adoption of a true "neighborhood" plan throughout New Kent County would, in fact, have provided adequate racial mixing. However, Swann unmistakably authorizes racial mixing beyond that which would result from simple neighborhood assignments to "counteract the continuing effects of past school desegregation." 402 U.S. at 28.

It is noteworthy that the historical, static fact of past discrimination is not enough, and that continuing effects must be found. Thus, even a one-race school resulting from typical urban residential patterns is not per se unconstitutional, but rather "suspect." Such additional factors as location or size calculated to serve one race must be found. Id.

This proviso suggests that historical discrimination plus present racial "imbalance" do not automatically coalesce into a constitutional violation. The analysis is tighter than that. The factor of active state responsibility (through past or present conduct) is indispensable to a finding of violation of equal protection rights under the fourteenth amendment. Admittedly, the question is whether there is some causational nexus between past discrimination and present conditions, but the question may be of decisive importance. In the present case attention to the state action issue is extremely important.

In cases such as Swann and Green where large proportions of blacks continued to attend schools that had always been black, in other words, where the mandate to abolish the dual school system had not, as "implemented," appreciably affected the status quo, the nexus to invidious state action was obvious. The objectionable history was indistinguishable from the present. But in the instant case, the school districts which had enforced segregation have, under court order, undertaken to exterminate the practice. The status quo has indeed been disrupted.

The evidence of state action proferred in the Richmond case is largely of a different species and, accordingly, of different "historical" signifcance than the familiar heritage of de jure segregation that has underpinned the racial mixing orders in cases such as Green or Swann. Hence, the issue of state action is deserving of rigorous analysis and the easy reference to the "sordid history" of desegregation in Richmond. Bradley v. School Board of City of Richmond, Virginia, 462 F. 2d

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1058, 1075 (4th Cir. 1972), should not be permitted to obfuscate the profoundly different issues Bradley thrusts forward.

The plaintiffs must rest their case for consolidation on the assertion that concerted state action of a nature proscribed by Brown I is responsible for residential patterns showing a heavy concentration of blacks in the City of Richmond. The impact on schools is a "disproportionate" number of blacks served by the Richmond system. The constitutionally commanded remedy, it is suggested, is transportation of blacks out of the City and whites into the City to adjust the "imbalances" created by housing patterns. These arguments may be met by two points: (1) Any "invidious state action" exposed by the evidence is far too dilute and its implications far too equivocal to be held to be a significant cause of the prevailing residential patterns in the area; and (2) were it supposed that state authorities have indeed succeeded in an invidious plan to lock black citizens of the area within the confines of the City, the broad equal protection issues presented should not be pressed into the well-defined mold of the school desegregation case, confusing major issues of the day that must be kept distinct.

The specific allegations of state action responsible for the "imbalances" do not fit into any coherent pattern, but must be discussed individually. The dissenting opinion favoring affirmance of the district court opinion beginning at 462 F. 2d 1071 (Winter, J.), portrays Richmond's dilatory response to the mandate of Brown I and subsequent judicial proddings as the cornerstone of the state action showing.

> [Bradley] is a case in which the transition to a unitary system has been delayed, as a result of state action and state inaction, until the schools on either side of artificial political subdivision boundaries, when compared one to the other, can only be said to be racially identifiable and . . . constitute a dual system.

462 F. 2d at 1075.

The reasoning underlying this assertion is fuzzy indeed. As a chronological matter it can hardly be said that due to recent state "inaction" a "dual system" has come to pass. This is because the dual system made unlawful by Brown I dates far beyond the events since 1954. Neither can it be maintained that dilatory state action, admittedly inimical to the spirit of Brown I, has hastened or contributed to the development of the particular "dual system" to which the district court currently objects. If the source of the city-county racial imbalance is the exodus of whites to the suburbs, it is logical that prompter desegregation under Brown I would have aggravated this situation, assuming, arguendo, that school policies have anything to do with housing patterns. It is submitted that delay of Richmond authorities in integrating its school is not state action responsible for the situation under scrutiny here, namely, the uneven distribution of the races between the City and the counties.

Other instances of "state action" accumulated by the plaintiffs have at least some theoretical relationship to the demographic patterns of the area. The appellate court dissenting opinion characterizes these instances as "principally in the area of residential development." 462 F. 2d at 1075.

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The state conduct indicated may be further characterized as essentially passive: the counties took no active role in inhibiting basically private acts of housing discrimination (e.g., giving effect to restrictive covenants), nor did it take positive steps in the area of public-subsidized housing to encourage emigration by the urban poor to the suburbs. As the majority opinion of the Court of Appeals suggests, the forces that cause black concentration in the urban cores of cities throughout the nation are so diverse and powerful that it is extremely doubtful whether "better" conduct on the counties' part could have made an appreciable dent in current conditions. 462 F. 2d at 1066.

It presumes too much to lay at the door of "state action" in the fourteenth amendment sense the responsibility for black concentration in the City of Richmond. The constitutional argument could, of course, be made that the equal protection clause requires local governments to eliminate "root and branch" the existence of urban ghettos. Imposing such an affirmative duty as a remedy for "state inaction" would bring about unprecedented expansion of the constitutional notion of "equality," as well as enormous burdens on localities and the courts.

The merits of these issues cannot be discussed here. The immediate point is that the "wrong" of state policy tending to perpetuate urban ghettos, with the fitting remedy of state-instigated residential desegregation, compose one major constitutional issue. Of course, the ramifications of the two policies are not mutually exclusive. State conduct which effectively deprives members of one race of residential opportunities in a particular district

would indirectly affect the racial composition of the schools. But again, if residential discrimination is the enemy, remedies dealing with schools are the wrong weapons with which to attack: To require school desegregation in the present case in order to "remedy" housing segregation would throw into confusion the evolving doctrine of Brown I and would render uncertain the legal position of hundreds of communities that have never practiced de jure segregation.

Cases in which pronounced racial imbalances in schools stemming strictly from residential patterns have been held beyond the reach of Brown I and the fourteenth amendment would have to be re-opened. See, e.g., Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ind. 1963), aff'd, 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J. 1971), aff'd mem., 404 U.S. 1027 (1972).

In a matter of such intense public concern a holding that would blur the lines of analysis in the school cases or spawn a vaguely conceived "penumbra of Brown" area of litigation would be most inadvisable. In this regard the court warned in Swann:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation

> cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

402 U.S. at 22.

Perhaps no court activity in recent history has been so intensely bathed in the public spotlight as the series of school desegregation cases. For this reason, the preservation of judicial clarity and simplicity are uppermost objectives. The gravamen of the constitutional violation is de jure segregation; elimination of the dual school system going beyond mere token desegregation is the remedial requirement. These principles should be given full implementation within their proper confines, but school desegregation remedies should not be employed to effect, by indirection, social policies well beyond their legal scope.

2. The communities involved have desegregated to the full extent required by federal law. Further desegregation orders propelled by belief in the virtues of an "ideal" racial mix misconceive the doctrinal foundations of the controlling court decisions. Such orders furthermore deprive both races of the major educational benefits secured by community schools.

The presence in this case of "state action" of diffuse and dilute nature poses special difficulties or the school-remedy analytical framework. If it s conceded, as does the Court of Appeals, 462 F. d at 1066, that some scant evidence of state action r "state inaction") exists, the constitutional conequences are still far from clear. It has been

contended that state action, the principal purpose of which is something other than maintaining a dual school system, ought not to be accepted uncritically as a "substitute" for state action relevant to a Brown-type case. Another major issue raised by plaintiffs' arguments is whether discrimination of the inconclusive sort present here warrants the erasure of traditional state-created political boundaries for school operation purposes through a constitutionally commanded displacement of local autonomy. Further questions of profound importance, implicitly answered by the district court opinion, are whether desegregation, as currently implemented in Richmond, is insufficient to satisfy the mandate of Brown I, and whether equality in education, the animating principle of Brown, is truly served by consolidation. All these inquiries, which must grapple with the political tensions created by constitutional adjudication under Brown I, are inter-related and will be discussed together.

The district court regarded county and city lines as arbitrary demarcations deserving little respect before the imperatives of situations calling for desegregation remedies. State subdivisional lines are not sacrosanct, but it would seem they are due considerable respect as a legitimate exercise of power plenary to the state in the absence of any manipulation of the power forbidden by the constitution. That power has not been wielded in a forbidden manner in creating the boundaries under attack.

The constitutional legitimacy of the Virginia county lines may be highlighted by a comparison with the invidious usages of state power at issue in United States v. State of Texas, 321 F. Supp.

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1043 (E.D. Tex. 1970), modified, 447 F. 2d 441 (1971), and in United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972). In the Texas case the state pleaded a legitimate exercise of state authority in the creation of independent school districts. The plaintiffs demanded, as in the instant case, consolidation of several districts to comply with Brown I. The court ordered consolidation. The facts, plainly distinguishable from those of the instant case, revealed that the state had carved out minute school districts that encompassed black neighborhoods or white neighborhoods, but not both. When population shifts occurred, the school boards allowed transfers across district lines to maintain color divisions among the schools. The pleas of innocence by the state authorities could not mask a careful scheme of district line-drawing to maximize segregation of school facilities.

In the Scotland Neck case, a single school district included a number of rural schools that had long been "Negro schools," and town schools that were predominantly white. In the face of an impending federal order for substantial racial blending of these schools, the Town of Scotland Neck, under a hasty authorization provided by the state legislature, declared itself an independent school district. The Supreme Court held the maneuver unconstitutional. Mr. Justice Burger, in a concurring opinion, took special note of the fact that the plan was not a racially neutral exercise of normal local prerogatives. Rather, the plan would perpetuate the existence of historically "Negro schools" and "white schools." 407 U.S. at 492. The severence of Scotland Neck from the county was not in the nature of a natural political development, but was "substantially motivated by

the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck." 407 U.S. at 492.

The Texas and Scotland Neck cases present similarly disingenious use of the state district-creating power. Zones contrived to take advantage of the de facto "loophole" were artificially carved out to evade federal law under the fourteenth amendment.

In the Richmond situation, reliance on historical county subdivisions stands on a different footing from the cynical manipulations of state power in the cases above. The "stage" of local discriminatory conduct has been the individual school district. In no case has the Brown mandate been construed to require more than the dismantling of the dual school system within the particular discriminating district. Larger areas could be drawn into desegregation plans, but the individual district is the logical stopping point. If a larger geographical unit is selected, it is difficult to see what limits can ultimately contain the outward reach of a desegregation order.

Perhaps more importantly, meaningful desegregation can be undertaken in the vast majority of cases within the context of the individual school district. Such is the case in Richmond, where the plan presently in effect satisfies the requirements under "current law." 462 F. 2d at 1061. In the city system, black students compose 34-80% of the student body of the various elementary schools; 39-81% of the middle schools; and 43-79% of the high schools. The city schools are "racially identifiable" only in the sense that the county

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schools are, in comparison, appreciably more white. But have not the essential commands of Brown been complied with? Public schools in Vermont are, no doubt, more appreciably white than their Richmond city counterparts. Yet this comparison is no less relevant than a Henrico County comparison if Richmond has, indeed, taken effective action to eradicate the dual system. The Supreme Court desegregation decisions do not require scrutiny of neighboring counties to test whether greater racial homogeneity may be attained.

Certainly Swann, the most recent and intensive Court discussion of desegregation remedies, does not suggest that such far-flung attempts to level racial imbalance are required. In Swann a single school district was under examination, and the facts (over half of the system's black students attended schools at least 99% black under a token desegregation plan) called out for remedial action far more plainly than the instant facts. Nonetheless, the Court, in tackling the imbalance-as-violation issue, stated that "particular degrees of racial balance or mixing" are not required "as a matter of substantive constitutional right," 402 U.S. at 24, and that:

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Id. Pursuant to this view, the Court noted that the existence of a school "all or predominantly of one race" would not, of itself, signal a discriminatory exercise of state authority. Rather, this might be attributable to the

> familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city.

402 U.S. at 25.

The Court also adverted to the Congressional definition of desegregation in Title IV of the Civil Rights Act of 1964. 42 U.S.C. § 2000 (c) (b), which specifies that desegregation does not mean "the assignment of students to public schools in order to overcome racial imbalances." If racial balance clearly is not requisite to desegregation in a particular school district, then it must be concluded, a fortiori, that uniform racial balances of schools in adjoining districts is not dictated by the equal protection clause under current interpretation.

The cases on school desegregation from Brown onwards begin with the proposition that the "Negro school" is inherently unequal. This proposition could be substantiated by the stark historical facts before the Brown Court. Desegregation was calculated to eliminate the "Negro school" and busing plans, inter alia, were prescribed to supplant mere tokenism that would not significantly disturb the status quo. These principles are not challenged here.

However, the notion apparently spun off from Brown that the equal protection clause requires school boards to shift large numbers of black pupils to schools with white majorities (if the "metropolitan" area contains a white majority) stands on dubious constitutional footing and equally dubious educational footing. Inasmuch as judicial reliance on this notion imports substantial federal intrusion

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upon traditionally local activity and the casting aside of the neighborhood school concept, the validity of the notion ought to be closely questioned. It is suggested here that the shifting of racial groups in order to approximate the "ideal" balance of 67% white, 33% black in the Richmond area is likely to work more harm than good.

There is material in Brown at 347 U. S. 494 suggesting that segregation, especially segregation sanctioned by law, inflicts a "sense of inferiority" upon the Negro child. It would seem true beyond doubt that the experience of being compelled to attend an old, decrepit school while the white child attends a fine new school might demoralize the black child. But it is a mighty leap from this reasonable perception to conclude that attendance in a school predominantly black, as determined by neighborhood composition, infects the black student with a crippling sense of inferiority. It seems at least equally sound to conclude that foisting upon the black pupil an environment in which he is perpetually in the minority is both unreal (against the background of community experience) and generative of a sense of being "lost" in the white majority.

Perhaps such an immersion seemed desirable a decade or even five years ago, but the clear contemporary trend is toward pride in blackness and the black community. The dominant thought in the era following Brown was that the black might best shed his sense of inferiority through the creation of a society that would ignore his blackness. This does not seem to be what the black community desires today, and it would be dangerously misguided for a court to bottom its perception of equal protection imperatives on anachronistic analyses of the

racial problem. If it is true that both the black and white communities desire and would be best served by localized rather than metropolitan school systems, then the remedy contrived by the district court is indeed an errant and needlessly disruptive enterprise.

For the time being, the neighborhood school institution must receive secondary priority to implementation of desegregation orders, but it is the contention of the Amicus Curiae that further and unnecessary derogation of the neighborhood school is not the order of the day. The school, particularly the elementary school, ought to be a real and immediate factor in the lives of those whom it affects, not some remote, anonymous institution to which the children are "sent off" when they become of age. The strength that community involvements and control supply to the local school cannot be overstressed. This may be most true in poor, black urban neighborhoods, where, in contrast to white, middle-class attitudes, respect for and interest in the school system may be something that must be won through personal involvement and awakening community awareness.

These perspectives on the problem have been elaborated by recent commentators. In Note, "Urban School Decentralization: The Problem of the One and the Many," 5 Colum. J. L. & Soc. Prob. 137, 166 (1969), this view is related:

> It is argued that "differential instruction based on differentiated needs [in the communities within the City] is at the heart of both equality and quality," and that boundaries should be drawn with an awareness of the resulting racial composition of the districts so

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> that minority group children will receive the type of education in their community schools which will provide them with educational opportunities truly equal to those of white, middle class students.

It is added at 168:

> Above all, decentralization must foster a special attitude in community residents. The school must become not "them," but "us." Citing D. Hunter, The Slums: Challenge and Responsibility 117 (1964).

In Note, "Civil Rights--Judicial Consolidation of Public Schools to Achieve Racial Balance," 25 Vand. L. Rev. 893 (1972) the idea is also explored, partly as an attractive alternative to busing and the public clamor it has raised.

> One alternative which permits retention of neighborhood schools and offers relief for inner city schools, is the decentralization of school board control. Recently, many articles and commission studies have concluded that decentralization in large urban areas would upgrade equality of education for the urban students. This approach would place greater control of the neighborhood schools in the hands of the neighborhood itself, thereby placing the central metropolitan school board primarily in a supervisory capacity. The need for decentralization appears greatest in ghetto areas where residents have little if any influence over the institutions that regulate their lives. A neighborhood school board could provide

> greater flexibility to meet the exigencies of the individual school, serve a cathartic function by allowing the airing of local grievances, and grant ghetto residents control over at least one institution that helps shape the lives of their children.

25 Vand. L. Rev. at 908.

The district court desegregation plan for the three-community area is, of course, inimical to these evaluations of the merit of neighborhood schools for all racial groups. It also badly misreads contemporary notions of "equality" from the black man's viewpoint. Equality no longer means complete fusion with the white community. It does mean equal access, equal opportunity, and an end to law-supported discriminations. But it most potently means the ability to develop and strengthen the black community, rather than the right to dissolve it by clinical proportions into the white majority. It is thus highly questionable whether the district court's order, tied as tenuously as it is to constitutional principles and precedents, is likely to promote true equality--which must be the manifest objective of fourteenth amendment adjudication.

3. A desegregation order that reorganizes local units of government is violative of the basic constitutional principal of federalism. The failure of the order to recognize the reservation of powers to state government not only undermines such government abstractly but negatives local democracy and home rule.

In the United States local self-government has been a tradition since colonial times. Indeed, the

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democracy of many counties, towns, cities, villages and school districts ante-date the democracy of the several states and of the federal government. Many of the states of the union have adopted constitutional provisions allowing local units of government to reshape their own charters by the adoption of charter ordinances. New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471 (1896); Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898). The American tradition favoring local democracy is so strong that within the last two decades the majority of people in metropolitan areas have gravitated to suburban communities where their personal participation in local government is close, direct and meaningful. This pattern of government is precisely the pattern envisaged by the federal constitution in reserving non-delegated powers to the states and the people. Knapp v. Schweitzer, 357 U.S. 371 (1958); United States v. Butler, 297 U.S. 1 (1936). The goal of desegregation should not be used as a cloak to disguise a violation of local autonomy established by state authority.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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Attorney for Amicus Curiae

March 13, 1973